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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 574.

CHARLES M. DOLEMAN, Administrator of the Estate of Robert R. Doleman,
Petitioner,

vs.

HARRY LEVINE,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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This is a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia to review the judgment affirming the action of the Supreme Court of the District of Columbia in overruling the demurrer to a plea in abatement and dismissing the suit.

The case involves the construction of the Longshoremen's and Harbor Workers Compensation Act, approved March 4, 1927 (U. S. C., Title 33, Chapter 18), as made applicable to employment in the District of Columbia by Act

of Congress approved May 17, 1928 (D. C. Code, Title 19, Chapter 2), which will hereinafter be referred to as the "Compensation Act"; and the Act of Congress of February 17, 1885 (23 Stat. at L. 307, Chapter 126; D. C. Code 1924, Sections 1301-1303; D. C. Code 1930, Title 21), which is a statute providing for liability for negligence causing death, and which will hereinafter be referred to as the "Death by Wrongful Act Statute".

The facts of this case have been fairly and accurately set forth in the petition for a writ of certiorari, and need not be repeated here.

For the sake of convenience, the petitioner will hereinafter be referred to as the plaintiff, and the respondent will hereinafter be referred to as the defendant. This is the position that was occupied by the parties hereto in the lower Court. The Potomac Electric Power Company, which, as appears from the record and the statement of facts, was the employer of the deceased and is paying and has paid compensation to Mary E. Doleman, widow of the deceased, and filed the other action against the defendant, will hereinafter be referred to as the "employer".

ARGUMENT.

At the outset of the argument the defendant desires to inform the Court that he has been named as defendant and served with process in two separate suits, each of which claims damages from him for the same alleged negligent act resulting in the death of Robert Doleman. Primarily, the defendant's position is that the right of action for negligence causing death is a single action, which cannot be split, and, before being put to his defense on the allegations of negligence, he is entitled to a decision finally determining which of the two suits that have been filed he must answer and defend. Having been served with process in both suits, and being required to appear and answer each case, and having no preference as between the two suits filed, the defendant filed a plea in abatement in

each suit, asserting in each plea that the other suit was properly brought and that the suit in which the plea was filed should abate.

The argument hereinafter will therefore be divided into two sub-divisions, in the first of which the defendant will support his primary position that he should be required to defend only one action, and in the second will support his plea in abatement in this case that the suit by the employer was the only proper and valid suit which could be maintained under the facts of this case.

There is Only One Right of Action for Negligence Causing Death in the District of Columbia.

The right to maintain an action and to recover damages for negligence causing death is solely statutory, and did not exist at common law. In the District of Columbia, such a right is expressly created by the Death by Wrongful Act Statute, which provides that "the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death".

The Compensation Act, similar in nature and purpose to the compensation laws in the various states, was designed to regulate the rights and liabilities between employer and employee. A burden is thereby placed upon an employer to secure compensation for an injury or death resulting from an accident without regard to fault or negligence on the employer's part. It is in effect a charge upon the industry or business in which the employer and the employees in any case are engaged; and upon that theory has been held to be constitutional. It is limited in its application to cases involving the relationship of employer and employee, or master and servant. See:

Crowell vs. Benson, 285 U. S. 22; 76 L. Ed. 598.

The Compensation Act makes provision for certain rights of the employer in cases where the injury to an employee

was caused by negligence of a third party, These provisions are found in Section 33 of the Act, and a casual reading of Section 33 discloses that such right or rights as are acquired by the employer are by way of assignment. The manifest purpose of this section is to give to the employer some right or opportunity of obtaining reimbursement in a case where he has been required to pay compensation, due to the fact that the injury occurred to the employee during the course of the employment, when the injury was occasioned by the negligence of a third party.

The Compensation Act did not create a new cause of action for negligence causing death.

> Aetna Life Insurance Company vs. Moses, 287 U. S. 530, 77 L. Ed. 477.
> Hunt vs. Bank Line, 35 Fed. (2nd) 136.
> Moore vs. Christensen S. S. Co., 53 Fed. (2nd) 299.
> Zirpola vs. Casselman, 237 N. Y. 367, 143 N. E. 222.
> U. S. Fidelity and Guaranty Company vs. Graham and Norton Company, 254 N. Y. 50, 171 N. E. 903.
> Storrs vs. Mech (Md. 1934), 170 Atl. 743.

In the case of Aetna Life Insurance Company vs. Moses, *supra*, this Court, in dealing with the Compensation Act and the Death by Wrongful Act Statute in question here, rejected the idea that the compensation law created any new cause of action for negligence causing death. In its opinion this Court said:

> "In the case where the employee survives and accepts compensation as the only person entitled, it is clear that the statutory assignment vests in the employer the full right to recover damages from the third person. Double recovery by the employee * * * is thus avoided. * * *
>
> "In this case the injury resulted in the death of the employee and the election to take compensation was made by the widow. * * * Her election has called into operation the statutory assignment so far as it applies

to the action for wrongful death. We must decide its effect on that cause of action."

In the case of Hunt vs. Bank Line, *supra*, the Circuit Court of Appeals for the Fourth Circuit, in a case under the Longshoremen's Act, held that upon acceptance of compensation an employee could not thereafter sue the third party whose negligence caused the injury, even though the employer refused to bring such a suit, as the entire right of action passed to the employer.

In the case of Moore vs. Christensen S. S. Company, *supra*, the Circuit Court of Appeals for the Fifth Circuit, in affirming a decision of the District Court denying the right of the Administrator of a deceased longshoreman to sue the third party whose negligence allegedly caused the death, said:

> "It is not to be supposed that for the same injury or death two actions against the same party were contemplated, one under the state law and another under the Act of Congress".

In Zirpola vs. Casselman, *supra*, the New York Court, in construing the New York Workmen's Compensation Law, which incidentally was the model used in drafting the Longshoremen's Act, said:

> "The Compensation Act did not create a new cause of action against wrongdoers other than the employer with a new class of beneficiaries. It found a cause of action already in existence, and assuming that this cause of action would continue in the future, it fixed the extent to which the shares that belonged to the dependents should be applied in reduction of the burdens that were placed upon the carrier."

In the very recent case of Storrs vs. Mech, *supra*, the Court of Appeals of Maryland, in construing a case involving construction of the death statute and the pro-

visions of the workmen's compensation law relative to actions where an employee is killed, said:

> "In other words, section 58 of Article 101 does not create any new liability, but simply designates in what manner the liability theretobefore existing under the common law and Lord Campbell's Act, should be enforced, and changes the parties who might be benefited by such enforcement.
>
> . . . . . .
>
> "There is nothing in conflict between the provisions of Article 67, 'Lord Campbell's Act', and Article 101 'Workmen's Compensation'. They both unquestionably deal with recovery for injuries resulting in death. The two statutes are in *pari materia* and must be construed together."

The opinion of the United States Court of Appeals in this case held that the most casual reading of the Act necessarily excluded any assumption that the third party would be subjected to separate and independent suits for the same cause of action. Indeed, it is not urged that the Compensation Act creates any new and separate cause of action against an alleged third party wrongdoer; and counsel for the defendant have been unable to find any case in which any Court has held that such a law created any such new cause of action. All of the authorities that have been found either expressly hold, or assume, that there is but one cause of action for negligence causing death.

Generally, a single wrongful or negligent act can give rise to but one cause of action in tort.

1 R. C. L. 344.

Baltimore Steamship Co. vs. Phillips, 274 U. S. 316; 71 L. Ed. 1069.

Brannenburg vs. Indianapolis P. & C. R. Co., 13 Ind. 103, 74 Am. Dec. 250.

Wheeler Sav. Bank vs. Tracey, 141 Mo. 252; 42 S. W. 946; 64 A. S. R. 505.

Kansas City M. & O. R. Co. vs. Shutt, 24 Okla. 96; 104 Pac. 51; 20 Ann. Cas. 255.

Since there is, and can be, only one cause of action for negligence causing death, the sole question presented in this case is the question of who is the proper party to maintain the action.

The Right of Action Under the Death by Wrongful Act Statute Has Been Assigned to the Employer.

There being one, and only one, right of action for negligence causing death, the question as to who is the proper party to maintain the action becomes one of statutory construction. The petitioner has set forth in the appendix to his brief Section 33 of the Compensation Act. The question of whether, under the facts of this case, the cause of action against the third party alleged wrongdoer has been assigned to the employer depends upon the construction of this Section 33.

It is perfectly clear from reading the provisions of Section 33 that when the employee is injured by reason of the alleged negligence of the third party, and the employee accepts compensation, the right of action is assigned to the employer. When the injury results in the death of the employee, the Statute is not so clear, and may well be said to be ambiguous, particularly by reason of the use of the words "of the person entitled to compensation". However, by reading together the various sub-paragraphs, it is apparent that the Act contemplates the same result in a case where death results as in a case of injury without death to the employee, namely, that when the employer is required under the Compensation Act to pay compensation the right of action against the third party alleged wrongdoer shall be assigned to him.

This Section 33 was involved in the case of Aetna Life Insurance Company vs. Moses, *supra*, and was construed

by this Court. In that opinion, and after discussing the various sub-paragraphs of Section 33, this Court said:

> "Having regard to these provisions and to the general purpose which the Act discloses with respect to rights of recovery when the injury does not result in death, we see no escape from the conclusion that the statute contemplates that the employer is to have the same control over the institution of an action for wrongful death, the compromise and settlement of the claim, and the distribution of the proceeds, as he is given in unambiguous language in the case where the injury results only in disability. What is made explicit by the statute with respect to the latter is implicit with respect to the former."

Further, in the opinion in the Moses case, this Court called attention to the fact that there would be no meaning to the language of Section 33 (2), directing the employer to pay any excess to the person entitled to compensation or to the representative, if it had been intended that the employer should get by way of assignment anything less than the entire right of action.

In the case of Moore vs. Christensen S. S. Company, *supra*, the Court further stated in its opinion that:

> "It clearly was the intent of Congress to assign to the employer all rights of the legal representative of the deceased, and also to enumerate the classes of the beneficiaries on whose behalf recovery might be had."

In this case we are concerned with a question of what person, or legal entity, is vested with the authority and right to maintain an action against the third party alleged wrongdoer for negligence causing death. In this connection the question may be said to be one of procedure. The defendant in this case is not concerned with questions of equities between next of kin or dependents, or with distribution of the proceeds of a recovery. Those questions may be settled and determined by the parties claiming an inter-

est therein, after the liability of the third party is determined. Obviously, the question of distribution of proceeds from recovery cannot arise unless the negligence question has been voluntarily settled or has been determined adversely to the third party and a judgment has been rendered against him.

The law, therefore, should be settled as to who is the proper person to institute and maintain such an action; or, otherwise, any third party, charged with negligence in connection with the death of an employee, would be unable to determine the person with whom he could, if he desired, settle or compromise the claim, nor would he know whose suit he might properly be called upon to defend.

The question of who is the proper person to maintain the action against the third party depends upon whether or not there was a valid election to accept compensation, which, under the terms of Section 33 of the Compensation Act, transferred the right of action to the employer.

In the light of the decision of this Court in the case of Aetna Life Insurance Company vs. Moses, *supra*, it is submitted that the decision of the United States Court of Appeals for the District of Columbia in this case, in which it was held that the employer, having paid compensation to the widow, is entitled to recover the amount paid, and that the right to recover part is the right to recover all, and further that where any beneficiary elects to take compensation the employer has the exclusive right to bring the action, is the correct and proper construction of the Compensation Act and is the correct and proper determination of the question as to who may maintain the action.

The plaintiff, in his brief, goes into great length to discuss certain inequities and discrimination in the distribution of the proceeds of a successful suit that would result from the decision that has been rendered in this case.

The right of action for negligence causing death is not an asset of the estate of the decedent, recovery under any such action is not subject to the debts of the decedent, and the

provisions of the Statute providing for distribution to next of kin are merely a convenient method for distribution of damages and do not create any vested interest in any estate.

It would seem that he complains that, by holding that the right of action is assigned to the employer, the method of distribution of the proceeds of the litigation is changed from that which is set out in the Death by Wrongful Act Statute, and that he is thereby being deprived of certain vested rights under the Death by Wrongful Act Statute. The Compensation Act was in force long before the happening of the accident which resulted in the death of the decedent; and the plaintiff had no vested interest to be deprived of.

It is submitted there are no vested rights in the method of distribution of damages received under a death statute. There are no vested rights in existing law which preclude its change or repeal. See:

Louisville & N. R. Co. vs. Mottley, 219 U. S. 467; 55 L. Ed. 297.
Mondon vs. New York, etc. Co., 223 U. S. 1; 56 L. Ed. 327.
Backus vs. Fort St. Union Depot Co., 169 U. S. 557; 42 L. Ed. 853.
Middleton vs. Texas Power, etc. Co., 249 U. S. 152; 63 L. Ed. 527.
Arizona Employers' Liability Cases, 250 U. S. 400; 63 L. Ed. 1058.

It would seem beyond argument that, since the right of action for negligence causing death is purely statutory, the Congress has the power to and may change the provisions of the Death by Wrongful Act Statute, and may set up a different method of distribution of the proceeds of such a suit, or may provide for a new class of beneficiaries. Dependents may properly be given a preference over next of kin. It may well be said that Congress has, by the enact- of the Compensation Act, changed the method of distribu-

tion under the Death by Wrongful Act Statute in any case in which the Compensation Act is also drawn into operation by proceedings thereunder. Such was the situation in the case of Storrs vs. Mech, *supra*, in which the Maryland Court of Appeals held that the Workmen's Compensation Law in Maryland had amended the Lord Campbell's Act whenever applicable by setting up a new class of beneficiaries.

The plaintiff concedes that under the facts of the Aetna case, *supra*, the right of action was validly assigned to the employer. Does not this destroy most of his arguments about the injustice of next of kin being barred, or their distributive share being diminished by reason of such assignment? In the Aetna case there might have been several next of kin, not dependents, who would have suffered all of the inequities and discrimination he sets forth, yet he concedes that there was a proper transfer; and it would therefore seem that the argument advanced cannot well be maintained without questioning the soundness of the decision in that case.

It might be noted that the distribution of proceeds derived from suits under so-called Lord Campbell's Acts in the various states varies greatly. There is nothing particularly sacred or vested in the provisions of our Statute directing distribution to next of kin, and our Statute conceivably works inequities in that it makes no provision for varying degrees of dependency between next of kin. For example, a wealthy child secures the same distributive share as a crippled, dependent child.

Any number of supposititious cases may be presented which would show discrimination in favor of one class of beneficiaries over another. To the list presented by plaintiff may be added another, which would illustrate the converse of the proposition urged by him, namely: Under the Statute of Distribution (Act of March 3, 1901; 31 Stat. 1250, c. 854, Sec. 377; April 19, 1920, 41 Stat. 563, c. 153;

D. C. Code 1930, Title 29, Sections 285 and 286), where there is no surviving spouse and there are children of the decedent, the children take all of the personalty equally. Under the Compensation Act a child or children eighteen (18) years of age may not receive compensation. If there be, in such a case, a father, who is dependent, he may be entitled to compensation; but he would not share in the distribution under the Statute of Distribution. Should the father in such case claim and receive compensation; and the administrator be permitted to maintain the action under the Death by Wrongful Act Statute, and distribute in accordance with its terms; then the employer would be required to pay compensation, and would not be entitled to receive any reimbursement out of the proceeds of the suit under the Death by Wrongful Act Statute. This would follow because the person receiving compensation would have no interest in any amount recovered in such suit. Such a situation is obviously contrary to the purpose and intent of Section 33 of the Compensation Act.

Apart from all this, the place for the correction of inequities and discrimination resulting from statutory rights, if any there be, is the Congress and not the Courts.

CONCLUSION.

In conclusion, therefore, it is respectfully submitted, first, that there is only one cause of action for negligence causing death in the District of Columbia; and, second, under the facts of this case this cause of action has been assigned to the employer under and by virtue of the terms of the Compensation Act. It follows that the decision of the United States Court of Appeals for the District of Columbia is the proper and correct determination of this controversy; and the plaintiff is not entitled to maintain an action gainst the defendant.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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